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NO. 35339-7-III

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

BROOK HOWELL,

Appellant,

v.

DEPARTMENT OF SOCIAL AND HEALTH SERVICES,

Respondent.

BRIEF OF RESPONDENT

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I. INTRODUCTION

Ms. Howell raises a single claim in this case—that the Department of Social and Health Services' (DSHS) act of retaining founded findings of child abuse or neglect violates that part of Washington's Law Against Discrimination (WLAD), RCW 49.60, that prohibits employment discrimination. But DSHS was never Ms. Howell's employer. Instead, she sought employment as a long-term care worker with a private entity; a position that she is prohibited by statute from holding due to the existence of a founded finding of negligent treatment or maltreatment of a child. Nevertheless, Ms. Howell's complaint does *not* challenge that statute and instead focuses on DSHS' records retention policies as a source of alleged employment discrimination. DSHS' policy of retaining records is not an employment practice and DSHS is not an "employer" under WLAD in these circumstances. Because it is the unchallenged statute—not the Department's practice of retaining information—that bars Ms. Howell's employment, her WLAD claim fails, and the trial court correctly dismissed the complaint.

Even if Ms. Howell were challenging the statute that bars her employment, dismissal would still be appropriate. DSHS would be entitled to discretionary immunity because the agency is merely implementing a policy decision of the Legislature. This provides an alternative basis to

conclude that the trial court properly dismissed the complaint. Ms. Howell should direct her concerns about founded child abuse and neglect findings and their impact on some types of employment to decision makers in the Legislature. This Court should affirm dismissal of the complaint.

II. COUNTER-STATEMENT OF ISSUES

A. It is undisputed that Ms. Howell did not seek a job with DSHS. Is DSHS an "employer" for purposes of WLAD merely by virtue of its retention and limited disclosure of child abuse and neglect findings?

B. If DSHS can be liable under WLAD for retention and limited disclosure of child abuse or neglect findings, is the agency entitled to discretionary immunity since it is acting to implement policy choices of the Legislature?

III. COUNTER-STATEMENT OF THE CASE

Appellant Brook Howell drove under the influence of alcohol and was arrested on November 4, 2012; three of her young children were in the vehicle with her, and two of them were unrestrained. Clerk's Papers (CP) at 4, 33-34. State law requires that when a parent is arrested for driving under the influence of alcohol with children in the car, the Washington State Patrol (WSP) trooper must make a report to child protective services. RCW 26.44.250; RCW 46.61.507. Thus, Children's Administration (CA), the administration within DSHS charged with protecting child welfare, received the report upon Ms. Howell's arrest and conducted an investigation as required by law. RCW 26.44.030(11); CP at 33-34. Ms. Howell admitted

to all of the facts in the WSP report and received a deferred prosecution deal in the criminal matter. CP at 33. Her admissions met the state law definition of negligent treatment or maltreatment. RCW 26.44.030(12)(a); CP at 33-34. The DSHS investigator issued a founded finding of child neglect. CP at 34. Ms. Howell challenged the finding through the administrative process and the review judge upheld it. CP at 33-34. She did not appeal to Superior Court.

The federal statute called the Child Abuse Prevention and Treatment Act required states to develop a process for making findings of child abuse and neglect (and for an administrative procedure to challenge those results) in order to develop a comprehensive location and system for tracking allegations of child abuse. Pub. L. 104-235, 110 Stat. 3071 (1996). The primary purpose of child abuse and neglect findings is for the child welfare agency to have an accurate historical record of treatment of children. *See, e.g.*, Child Welfare Policy Manual § 2.1A.2 (acknowledging the need for state child welfare officials to have access to historical information to make decisions about risk, while discussing the treatment of unsubstantiated findings.)[1] CA staff use the child welfare information, of which founded

[1] The Child Welfare Policy Manual is published by the Children's Bureau, a division of the Office of the Administration for Children and Families (ACF) under the federal Department of Health and Human Services, and it provides the federal government's policies for implementation of applicable federal laws. It can be found at: http://www.acf.hhs.gov/cwpm/programs/cb/laws_policies/laws/cwpm/index.jsp.

findings are a part, to meet agency obligation to reunify families, pursue placement with relatives, and obtain permanency for children in its care, custody, and control. *See generally*, 42 U.S.C. § 671 (requiring notification of removal of children to relatives and reasonable efforts to place with relatives and siblings, prevent removal, facilitate permanency); *see also* RCW 13.34.020 ("the family unit is a fundamental resource of American life which should be nurtured"); *see also* RCW 13.34.136 (preference for relative placement); RCW 13.34.138 (development of permanent plans).

Washington state statute prohibits those people with founded findings of child abuse or neglect from some types of direct employment with vulnerable adults. RCW 74.39A.056. This broad prohibition applies to "long term care workers"[2] and includes employment in a variety of fields. RCW 74.39A.009. The law started as an initiative of the voters to protect the elderly and disabled by "reinstating the requirement that all long-term care workers obtain criminal background checks." Laws of 2012, ch. 1, § 1 (Initiative Measure No. 1163). In this context, background checks include

[2] The term "long term care workers" covers a number of fields and capacities and is defined to "include all persons who provide paid, hands-on personal care services for the elderly or persons with disabilities, including but not limited to individual providers of home care services, direct care workers employed by home care agencies, providers of home care services to persons with developmental disabilities under Title 71A RCW, all direct care workers in state-licensed assisted living facilities, and adult family homes, respite care providers, direct care workers employed by community residential service businesses, and any other direct care worker providing home or community-based services to the elderly or persons with functional disabilities or developmental disabilities." RCW 74.39A.009.

civil findings because the initiative also barred people with founded findings of abuse or neglect from providing long-term care. RCW 74.39A.056; Laws of 2012, ch. 1, § 106 (Initiative Measure No. 1163).

Like all state agencies, DSHS' records are subject to state retention policies. RCW 40.14. The statute dictates that only the State Records Committee has authority to change records retention schedules and dictate the minimum length of time that agencies must retain records. RCW 40.14.050. It also sets forth the procedure by which the Committee sets retention schedules at the recommendation of effected agencies. RCW 40.14.050-.060. Those agencies make a recommendation based on the agency's business need for the record. RCW 40.14.040(4). DSHS retains child welfare records for 35 years in accordance with its records retention schedule. https://www.sos.wa.gov/archives/recordsmanagement/state-agencies-records-retention-schedules.aspx, at 64 (last visited December 26, 2017.) Those records are confidential under both state and federal law, although exceptions allowing for disclosure exist. 42 U.S.C. § 5106a(b)(2)(B)(viii); RCW 13.50.100. One such exception is that the person who is the subject of the record may authorize its disclosure. 42 U.S.C. § 5106a(b)(2)(B)(viii)(I). A position as a long-term care worker

requires a background check to include a check of child welfare records. RCW 43.43.832(2)(d).

Ms. Howell filed a complaint against DSHS alleging a single claim: the agency's policy of retaining and disclosing a founded finding of child neglect violates WLAD because it impacts her ability to obtain employment. CP at 10; *see also*, Brief of Appellant (Br. of App.) at 19. DSHS moved to dismiss the complaint pursuant to CR 12(c), arguing that DSHS' policy was not an employment practice and that Ms. Howell's real claim was an unsuccessful challenge to the employment limitations in the long-term care statute. CP at 21-26. DSHS also argued that, to the extent that Ms. Howell's real challenge was to the bar on employment of people with founded findings, the agency was entitled to discretionary immunity. CP at 26-30. This is because even if child abuse or neglect findings have a disparate impact in violation of WLAD, DSHS is implementing the Legislature's competing public policy goal of keeping vulnerable adults safe by putting limitations on employment of people with those findings. The trial court granted DSHS' motion. CP at 69-70. Ms. Howell's appeal followed. CP at 66-67.

IV. ARGUMENT

A. Standard of Review

This Court reviews a dismissal under CR 12(c) de novo. *P.E. Sys., LLC, v. CPR Corp.*, 176 Wn.2d 198, 203, 289 P.3d 638 (2012). Factual allegations in a complaint are presumed true. *Haberman v. Wash. Pub. Power Supply Sys.*, 109 Wn.2d 107, 120, 744 P.2d 1032 (1987). Importantly, however, legal conclusions couched as factual allegations are not and cannot defeat a motion to dismiss. *Id.*; *see also Papasan v. Allain*, 478 U.S. 265, 286, 106 S. Ct. 2932, 92 L. Ed. 2d 209 (1986) ("[Courts] are not bound to accept as true a legal conclusion couched as a factual allegation"). An appellate court "may sustain the trial court result on any correct ground, even though that ground was not considered by the trial court." *Gamboa v. Clark*, 180 Wn. App. 256, 283, 321 P.3d 1236 (2014).

B. WLAD Liability Does Not Extend to Third Parties That Merely Retain and Disclose Information

WLAD was enacted in 1949 and prohibits "unfair practices" in a variety of specific areas including in public accommodation, in credit transactions, and by financial institutions. RCW 49.60.175-.200. The Legislature amended the statute in 1973 to create a cause of action against any employer engaged in an "unfair practice." *Griffin v. Eller*, 130 Wn.2d 58, 63, 922 P.2d 788 (1996). Further, in *Marquis v. City of Spokane*, 130 Wn.2d 97, 922 P.2d 43 (1996), the Washington Supreme

Court expanded the scope of the law when it held that a cause of action for independent contractors exists in the declaration of civil rights portion of the statute. *Id.* at 112. Washington courts recognized a "disparate impact" claim as a means of proving employment discrimination in *Fahn v. Cowlitz Cty.*, 93 Wn.2d 368, 375-76, 610 P.2d 857 (1980). Such a cause of action exists where a facially neutral "employment practice" falls more harshly on a protected class. *Id*.

Contrary to her assertions, Ms. Howell did not plead a *prima facie* case of disparate impact discrimination because she does not establish how DSHS' retaining and disclosing of records constitutes an employment practice. Rather, she primarily focused on factual allegations of disparate impact without analyzing Washington cases to establish how DSHS could be liable under an *employment* discrimination theory when it is undisputed that Ms. Howell did not seek a position with DSHS. DSHS does not violate WLAD here for two reasons: (1) DSHS's action of retaining its records and disclosing them as required by statute is not an employment practice because in that context the agency is not an employer as defined by WLAD and (2) even considering Title VII cases as persuasive authority, DSHS is not "an indirect employer."

1. DSHS' conduct is not an actionable "employment practice" under WLAD because DSHS is not an "employer" even under the broad definition of the statute

WLAD is not a bar to discrimination generally. *See e.g.*, *Zhu v. N. Cent. Educ. Serv. Dist.-ESD 171*, __ Wn.2d __, 404 P.3d 504, 510 (2017) ("unlikely that the statute contemplates a cause of action against someone who engages in retaliatory discrimination against a purely social acquaintance in a purely social capacity, even if the discriminator otherwise happens to be an employer"). Instead, even though the statute is to be construed broadly to effectuate its purpose, a cause of action must be grounded in the language of the statute. *Marquis*, 130 Wn.2d at 110. Without citation to a specific part of the statute, Ms. Howell relies generally on the language that prohibits discrimination in employment. Br. of App. at 16; CP at 10.

Ms. Howell has not made a prima facie showing of employment discrimination by DSHS. Ms. Howell did not seek employment with DSHS. Instead, she argues that DSHS's retention and disclosure of her founded finding "foreclosed her employment opportunities" and thereby violated WLAD. Br. of App. at 16. This argument fails because a disparate impact claim requires that there be an "employment practice," *Fahn*, 93 Wn. App. at 375-76, and Ms. Howell has not sufficiently alleged an employment

practice by DSHS. As a result, Ms. Howell has failed to state a WLAD claim against DSHS for its retention and disclosure of founded findings of child abuse and neglect.

DSHS's retention and disclosure of founded findings is not an employment practice; rather, it is a business practice of the agency for purposes of having child welfare records, including founded findings of child abuse or neglect, available to social workers working with families to meet its obligation to reunify families, pursue placement with relatives, and obtain permanency for children in its care, custody, and control. *See generally*, 42 U.S.C. § 671 (requiring notification of removal of children to relatives and reasonable efforts to place with relatives and siblings, prevent removal, facilitate permanency much of which requires retention of historical information including founded findings); *see also* RCW 13.34.020 ("the family unit is a fundamental resource of American life which should be nurtured"); *see also* RCW 13.34.136 (preference for relative placement). DSHS' retention and disclosure of records is entirely unrelated to employment. The mere retention and disclosure of records, in and of itself, has no effect on whether a person is employed. The effect on employment comes only from the *statutory* prohibition on employment,

which is not challenged in this case, and/or an employer's decision regarding what to do with the information that is disclosed.[3]

Further, DSHS is not Ms. Howell's employer under WLAD. WLAD defines "employer" to include "any person acting in the interest of an employer, directly or indirectly, who employs eight or more persons . . . ."[4] The statute does not define what it means to act directly or indirectly in the interest of an employer.

In cases extending the WLAD's definition of "employer" beyond the traditional employment relationship, the actions of the person or entity furthered the interests of employer, either directly or indirectly. For example, in *Brown v. Scott Paper Worldwide Co*., 143 Wn.2d 349, 361-62, 20 P.3d 921 (2001), the Washington Supreme Court held that individual supervisors who engage in employment discrimination are "employers" under WLAD. Individual supervisors undeniably further the interests of

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[3] If WLAD liability broadly applied to all entities that merely retain or disclose information that would have broad and troubling implications. Does a newspaper potentially violate WLAD by maintaining archives, where those archives are consulted, and their contents considered, by employers? Does a website that contains archived information about individuals potentially violate WLAD, where the website is viewed by employers during the hiring process?

[4] The state and Title VII (the federal anti-discrimination statute) offer significantly different definitions of the term "employer" and so the interpretation of federal antidiscrimination laws is not directly applicable. *See Martini v. Boeing*, 137 Wn.2d 357, 372, 971 P.2d 45 (1999). Compare the above definition to Title VII, which states: "'employer' means a person engaged in an industry affecting commerce who has fifteen or more employees . . . and any agent of such a person." Civil Rights Act of 1964, 42 U.S.C. § 2000e(b).

their employers. Because the retention of an independent contractor furthers the interests of an employer, this inquiry also explains the inclusion of the employer-independent contractor relationship as one covered by WLAD. *See Marquis*, 130 Wn.2d at 112-13.

By contrast, courts have held that a person or entity is not an employer where that person's actions do not further the interests of the employer. For example, co-workers who have no supervisory responsibility are not acting "directly or indirectly" on behalf of an employer. *Jenkins v. Palmer*, 116 Wn. App. 671, 675, 66 P.3d 1119 (2003). Similarly, this Court concluded, in an unpublished decision, that a parent corporation is not an employer under WLAD when it is not involved in the employment relationship between the subsidiary and the subsidiary's employee. *Buhr v. Stewart Title of Spokane, LLC*, 176 Wn. App. 28, 308 P.3d 712 (2013). This decision is unpublished, has no precedential value and is not binding on any court and is cited only for such persuasive value as the court deems appropriate. GR 14.1; *Crosswhite v. Dep't. of Soc. & Health Servs.*, 197 Wn.2d 539, 389 P.3d 731 (2017). Under these cases, the touchstone is the extent to which the actions complained of further the business of the employer. Importantly, if people who actually work for the employer are not acting directly or indirectly in the interests of their employer, it strains

logic to see how the records retention practices of a third party entity could somehow be.

DSHS' retention and limited disclosure of founded findings are not done in the interest of any prospective employer of Ms. Howell, either directly or indirectly. Rather, such retention and possible disclosure are in service of the public and based on DSHS' business needs in order to comply with state statutes. Nothing in that process is an action in the interest of an employer, directly or indirectly.

Neither the plain language of the statute nor a reasonable extension of it supports Ms. Howell's claim. DSHS's retention and disclosure of child abuse or neglect findings is a business practice of the agency, not an employment practice performed "directly or indirectly on behalf of an employer." As noted by the trial court, "[it was] not convinced that the Department stands in any role remotely akin to an employer for purposes of the Washington Law Against Discrimination simply because they keep these records . . . ." RP 39:2-6, Oct. 5, 2017. As a result, Ms. Howell's employment discrimination claim under WLAD fails and the trial court properly dismissed her complaint. This Court should affirm that order.

2. DSHS is not an "indirect employer" under Title VII and the rationale of those cases does not extend to the conduct at issue here

Ms. Howell seeks to use a Title VII analysis in place of WLAD. However, the Washington Supreme Court has held that cases interpreting Title VII's definition of "employer" are "not directly applicable here because the language of" the WLAD definition "is significantly differently from corresponding federal law." *Brown*, 143 Wn.2d at 358, (citing *Martini v. Boeing*, 137 Wn.2d 357, 372, 971 P.2d 45 (1999)). Title VII cases therefore do not inform the analysis of what it means to be a "person acting in the interest of an employer, directly or indirectly" under WLAD. RCW 49.60.040(11).

In any event, even assuming that Title VII cases were relevant in construing WLAD's interpretation of "employer," the cases relied on by Ms. Howell do not support her argument that DSHS was an employer here. Ms. Howell cites *Lutcher v. Musician Union Local 47*, 633 F.2d 880, 883 (9th Cir. 1980), and *Ass'n of Mexican-Am. Educators (AMAE) v. State of Cal.*, 231 F.3d 572, 583 (9th Cir. 2000), for the proposition that "[a] direct employment relationship is not a prerequisite to Title VII liability." Br. of App. at 18. The Department does not contend otherwise; RCW 49.60.040(11) expressly contemplates that a person who indirectly acts in the interests of an employer may be liable under WLAD. Even under

Title VII, however, "there must be *some* connection with an employment relationship for Title VII protections to apply." *Lutcher*, 633 F.2d at 883 (emphasis added).

In *Lutcher*, the connection with the employment relationship was that the defendant's union allegedly denied the plaintiff the opportunity to perform with union musicians. *Id.* at 882, 885. That relationship does not exist here; it was the statute that denied Ms. Howell from obtaining employment as a long-term care provider, not DSHS's retention and disclosure of records.

In *AMAE*, the connection was that the state, which administered a licensing examination, exercised a "peculiar degree of control . . . over local school districts," which were the direct employers. *AMAE*, 231 F.3d at 581. This included general legislative oversight and involvement in "the day-to-day operations of local public schools." *Id.* "Indeed, the state is so entangled with the operation of California's local school districts that individual districts are treated as 'state agencies' for purposes of the Eleventh Amendment." *Id.* at 582 (citing *Freeman v. Oakland Unified Sch. Dist.*, 179 F.3d 846 (9th Cir. 1999)). By contrast, DSHS retains child abuse or neglect findings for child welfare purposes. Child Welfare Policy Manual § 2.1A.2. The agency disseminates the findings only to employers when authorized by the person with the finding. This activity is far removed from

the type of pervasive control over hiring, budgets, curriculum and other operations exercised by the California education agency.

Instead, analogous Title VII cases support dismissal of Ms. Howell's claims. Title VII cases have rejected Title VII liability where "the only connection among the licensing agency, the plaintiff, and the universe of prospective employers is the agency's implementation of a general licensing examination." *AMAE*, 231 F.3d at 583; *see also id.* at 593 (Reinhardt, J., concurring in part and dissenting in part); *Fields v. Hallsville Indep. Sch. Dist.*, 906 F.2d 1017 (5th Cir. 1990) (holding that there is no liability for teachers' certification exam where there was not close relationship between employer and examining agency); *George v. New Jersey Bd. of Veterinary Med. Exam'rs*, 794 F.2d 113 (3d Cir. 1986) (holding that there is no liability for administering veterinary licensing exam); *Haddock v. Bd. of Dental Exam'rs*, 777 F.2d 462 (9th Cir. 1985) (holding that there is no liability for administering dental licensing exam).

In sum, Ms. Howell's reliance on Title VII cases is misplaced because the Washington Supreme Court has held that Title VII cases do not help inform the interpretation of "employer" under WLAD. But even under a Title VII analysis Ms. Howell's claims fail because DSHS does not exercise the pervasive control over employment that has led to liability in

that context. Thus the trial court properly dismissed Ms. Howell's complaint and this Court should affirm that order.

C. The Employment Limitations in RCW 74.39A.056 Do Not Violate WLAD and Are Protected By Discretionary Immunity

Ms. Howell repeatedly—and mistakenly—argues that DSHS's retention of founded findings prohibits persons from obtaining certain types of employment. Br. of App. at 1, 2. As discussed above, the prohibition is set by statute; DSHS's retention of records does not itself have any impact on employment. This is fatal to Ms. Howell's WLAD challenge to DSHS's retention of founded findings. Though she disclaims any challenge to the statute, *see* Br. of App. at 13, 19, to the extent this Court construes her real challenge in this lawsuit to the statute that bars her employment, it fails for two reasons. First, applying well-established principles of statutory interpretation, the Court must harmonize WLAD and the statute imposing employment limitations and not simply invalidate one in favor of the other. Second, RCW 74.39A.056 reflects a basic governmental policy decision that is protected by discretionary immunity.

Here, the trial court properly rejected liability under WLAD. But the trial court also recognized that to the extent Ms. Howell has cloaked her statutory challenge in a claim against DSHS for its implementation of the

Legislature's public policy goals, that work is entitled to discretionary immunity. This Court should affirm that order.

1. This Court must harmonize the statutes at issue, not invalidate one's policy goals in favor of the other

To the extent that there are competing policy objectives between WLAD and long term care statutes, rules of statutory construction require that courts read those statutes in harmony. *Am. Legion Post #149 v. Dep't of Health*, 164 Wn.2d 570, 588, 192 P.3d 306 (2008). The objective is to achieve a reading that "maintains the integrity of the respective statutes." *Id.* It would violate this canon of construction if the Court were to invalidate the operation of the more-recently-enacted RCW 74.39A.056 based on RCW 49.60.030.

DSHS maintains child abuse or neglect findings for child welfare purposes. Pub. L. 104-235, 110 Stat. 3071 (1996); RCW 26.44; Child Welfare Policy Manual § 2.1A.2. By an initiative of the people, state law requires that those findings should act as a prohibition on some types of employment (including long term care under RCW 74.39A.056) and further delegated to DSHS the responsibility to make rules to consider the impact of those findings on care for which the State pays or is responsible (RCW 43.43.832(4)). Intent findings, Laws of 2012, ch. 1 (Initiative Measure No. 1163).

DSHS is not responsible for the fact that Appellant cannot work in long-term care. DSHS retains records in a confidential database for the agency's business purposes related to child welfare, pursuant to state retention schedules. It is only when a person who is the subject of a finding authorizes the disclosure of a report to a prospective employer that it has a consequence, but this consequence occurs because the voters of the State determined that the finding is relevant in that context, not because DSHS is acting in the interest of the employer. Where DSHS discloses the report, it is at the direction of the Legislature pursuant to the initiative, consistent with the public policy goals of keeping children and vulnerable adults safe. This Court must harmonize the language of the two statutes, rather than improperly expand or construe the language of WLAD at the expense of the protections offered to vulnerable adults through the prohibition on employment by people with founded findings under the long-term care statute.

2. The limitations on employment in RCW 74.39A.056 reflect a policy decision of the government that is entitled to immunity

While Ms. Howell repeatedly claims that she challenges only the retention of findings, the retention of findings did not cause the harm she alleges. The statutory bar to employment caused her alleged harm. DSHS did not erect that bar, but implements the policies established in the statute.

To the extent that DSHS may be liable to her for that employment bar, the agency is entitled to discretionary immunity. Discretionary immunity shields government from liability for policy decisions. *Evangelical United Brethren Church of Adna v. State*, 67 Wn. 2d 246, 407 P.2d 440 (1966). This immunity extends to the processes needed to implement policy decisions. "[T]here must be room for basic governmental policy decision *and the implementation thereof*, unhampered by the threat or fear of sovereign tort liability . . . ." *Id.* at 254 (emphasis added).

The Washington Supreme Court has identified four questions that this Court must ask to determine whether discretionary immunity is appropriate:

> (1) Does the challenged act, omission, or decision necessarily involve a basic governmental policy, program, or objective?
>
> (2) Is the questioned act, omission, or decision essential to . . . accomplish[ ] . . . [the] objective?
>
> (3) Does the act, omission, or decision require the exercise of basic policy evaluation, judgment, and expertise?
>
> (4) Does the governmental agency involved possess the requisite constitutional, statutory, or lawful authority and duty to do or make the challenged act, omission, or decision?

Id. at 255. The trial court answered all four questions in the affirmative. This Court should affirm that order.

The facts of *Evangelical* are instructive in how to apply the rule of law it defines. There, a youth with an extensive history of behavioral problems, including fire setting, was committed to Green Hill School. *Id.* at 250-51. Despite being on close supervision, he managed to escape the facility and set fire to surrounding structures. *Id*. Homeowners whose houses burned sued the state agency responsible for Green Hill School in tort alleging negligence 1) in the way that Green Hill School operated its program and 2) in assigning the youth with such a history to the School. *Id*. at 257. The *Evangelical* court found no liability, deciding that as to those two theories the State was entitled to discretionary immunity because of the statutes that provided the authority for the program. *Id*. at 256-57. The Legislature "made a policy determination with respect to the care and correction of delinquent youngsters," and further enacted statutes to create juvenile institutions and provide for treatment, as well as to delegate to the state agency the authority to operate the facilities. *Id.* at 255. The Court determined that because the state agency was vested with authority, expertise, and discretion to fulfill the goals of the Legislature it met the test previously articulated.

Here, DSHS is similarly acting to fulfill the direction of the Legislature. The Legislature, following the will of voters as expressed through initiative, has determined that a person who has a founded finding

of abuse or neglect of a child may not work in certain fields that involve access to vulnerable persons. *E.g.*, RCW 74.39A.056(2). Protection of the State's most vulnerable people is a core function of government and a role in this effort is delegated to DSHS by statute as the agency with the mandate and expertise to fulfill the Legislature's goal. RCW 26.44.010; RCW 43.43.832; RCW 74.15.010. The actions challenged here—DSHS's retention of founded findings and limited disclosure of the existence of those findings—do not bar Ms. Howell from employment. To the extent records retention fulfills a secondary purpose that affects her employment opportunity, that purpose was decided by the Legislature. Like the immune state agency in *Evangelical* that was provided with discretion to operate the facility and determine placement of the youth, discretionary immunity shields DSHS from liability for retaining records as part of its role here in implementing the high level decisions of the Legislature.

Ms. Howell contends that DSHS's policy of not expunging founded findings of child abuse or neglect violates WLAD. But DSHS has followed the records retention requirements to develop a schedule as directed by the records committee that meets the agency's business needs. *See* RCW 40.14.040-.060; WAC 388-15-077 (founded findings are to be retained in accordance with DSHS records retention policies); https://www.sos.wa.gov/archives/recordsmanagement/state-agencies-

records-retention-schedules.aspx, p. 64 (last visited December 26, 2017). It is well-settled that a state agency can act only within the authority granted to it by the Legislature. *Fahn*, 93 Wn.2d at 375. DSHS is required to make a finding at the conclusion of an investigation. RCW 26.44.030(12)(a). DSHS is required to expunge records of screened-out or unfounded reports as directed by statute. RCW 26.44.031(2); WAC 388-15-077. DSHS keeps founded child abuse or neglect findings pursuant to a records retention schedule so that social workers working with families have access to important historical information. RCW 26.44.031(3); Child Welfare Policy Manual § 2.1A.2. This historical information is used by CA to meet its obligation to reunify families, pursue placement with relatives, and obtain permanency for children in its care, custody, and control. *See generally*, 42 U.S.C. § 671 (requiring notification of removal of children to relatives and reasonable efforts to place with relatives and siblings, prevent removal, facilitate permanency); *see also* RCW 13.34.020 ("the family unit is a fundamental resource of American life which should be nurtured"); *see also* RCW 13.34.136 (preference for relative placement); RCW 13.34.138 (permanency plans).

Furthermore, no authority exists for the agency to conduct suitability reviews related to employment in long-term care. RCW 74.39A.056. Suitability reviews, which consider whether someone is capable of

providing care despite the existence of a founded child abuse or neglect finding, are authorized by statute only in the context of placing children in out-of-home care or in licensed foster homes, neither of which is applicable here. RCW 74.13.700; RCW 74.15.030(3).

These statutes govern DSHS' conduct. They further demonstrate why the agency is entitled to discretionary immunity because they direct the agency's actions and its authority to fulfill the Legislature's policy goals. DSHS is entitled to discretionary immunity. The trial court properly granted DSHS' motion to dismiss. This Court should affirm.

III. CONCLUSION

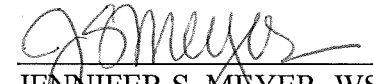
DSHS is not Ms. Howell's "employer" as defined by WLAD, and therefore cannot be liable under that statute. Liability for alleged discriminatory conduct is not boundless; rather, it must be grounded in the statutory scheme that gives rise to the cause of action. RCW 49.60. Disparate impact claims require an "employment practice." *Fahn*, 93 Wn. App. at 375-76. While courts are to construe the statute broadly, no Washington case extends liability for an employment practice to a third party that is not working to further the business of the employer.

Employment prohibitions in the long-term care statute express the will of the voters, who by initiative determined that individuals with founded findings of child abuse or neglect must not work with vulnerable

adults. This Court must harmonize any tension between two conflicting statutes, not read one to the exclusion of the other. Since Ms. Howell's true challenge is to that statutory limitation on employment of people with founded child abuse or neglect findings, DSHS is entitled to discretionary immunity because the agency is implementing a policy choice of the Legislature. The trial court properly concluded that Ms. Howell's complaint failed to state a claim. This Court should affirm the order dismissing the complaint.

RESPECTFULLY SUBMITTED this 8th day of January, 2018.

ROBERT W. FERGUSON
Attorney General



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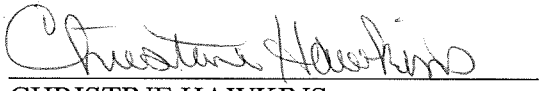

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